No. 92-171

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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ALICIA RODRIGUEZ-MORALES,
A/K/A GLORIA HERNANDEZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

NINA GOODMAN
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

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## QUESTION PRESENTED

Whether the district court has authority to sentence a defendant who has cooperated with the government below the statutory mandatory minimum sentence if the government files a motion under Sentencing Guidelines § 5K1.1 requesting a downward departure from the Guidelines sentencing range, but not a motion under 18 U.S.C. 3553(e) requesting a sentence below the statutory minimum.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 958 F.2d 1441.

### JURISDICTION

The judgment of the court of appeals was entered on March 11, 1992. A petition for rehearing was denied on April 27, 1992. Pet. App. B1. The petition for a writ of certiorari was filed on July 27, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner pleaded guilty in the United States District Court for the Western District of Missouri to possessing cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 36 months' imprisonment, to be followed by five years of supervised release. The government appealed petitioner's sentence, contending that the district court erred in sentencing petitioner below the statutory mandatory minimum sentence of ten years' imprisonment. The court of appeals reversed and remanded for resentencing at or above the mandatory minimum. Pet. App. A1-A39.

1. On October 12, 1990, law enforcement agents arrested petitioner at the Kansas City International Airport after she admitted during an investigative stop that she was carrying crack cocaine in her suitcases. A search of petitioner's luggage revealed approximately 8,000 grams of cocaine. Petitioner told the agents that she was delivering the cocaine to a person in Kansas City she knew as "Mike," and she agreed to cooperate with the agents in making a controlled delivery of the drugs to "Mike." The agents accompanied petitioner to a motel, where she made telephone calls to arrange for "Mike" to pick up the drugs. When Michael Garrett arrived at the motel, the agents arrested him. Pet. App. A2-A3.

Thereafter, petitioner entered into an agreement with the United States in which she agreed to plead guilty to possessing cocaine base with the intent to distribute it. The agreement provided that if petitioner provided "substantial assistance as determined by the United States and defined in § 5K1.1 of the Sentencing Guidelines, * * * the United States would

file a motion *authorizing* the Court to depart downward from the Sentencing Guidelines and the statutory minimum pursuant to Title 18, United States Code, Section 3553(e)."[1] Pet. App. A3-A4 (emphasis in agreement).

The government took petitioner's deposition to preserve her testimony in the event she was unavailable to testify at Garrett's trial. During the deposition, petitioner testified that she had never been to Kansas City before her arrest. Pet. App. A4. The prosecutor later learned that petitioner had made other trips to Kansas City to deliver drugs. May 15, 1991, Tr. 11. Because of petitioner's false testimony at the deposition, the government did not call petitioner as a witness at Garrett's trial. Pet. App. A4-A5.

The applicable Sentencing Guidelines range for petitioner's offense was 235 to 295 months' imprisonment. Pet. App. A5. Before petitioner's sentencing, the government filed a motion pursuant to Sentencing Guidelines § 5K1.1 requesting that the district court "consider the imposition of a sentence below the

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[1] Sentencing Guidelines § 5K1.1 provides, in part:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Section 3553(e) of 18 U.S.C. provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

range computed under the sentencing guidelines" based on petitioner's "substantial assistance to the government in the investigation of Michael Garrett." Motion for Downward Departure Pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines at 1. The motion described petitioner's cooperation with federal agents in arranging the controlled delivery of drugs to Garrett. The motion also stated, however, that the government had "decided against calling [petitioner] as a witness at Garrett's trial" after learning that she "had lied under oath during her deposition." *Id.* at 2. The motion expressly stated that it was "filed pursuant to Section 5K1.1 only and in no way alters or affects the mandatory minimum sentence applicable in this case." *Ibid.*

At petitioner's sentencing, the prosecutor explained that the government had moved for a downward departure from the Guidelines sentencing range under Section 5K1.1 because of petitioner's assistance in arranging the controlled delivery of drugs that led to Garrett's arrest. May 15, 1991, Tr. 10. The prosecutor also stated, however, that the government had not filed a motion under 18 U.S.C. 3553(e) requesting a sentence below the statutory minimum because petitioner's untruthfulness at her deposition, which prevented the government from calling her as a witness at Garrett's trial, had jeopardized the government's case against Garrett. May 15, 1991, Tr. 11-12. The district court concluded that the government's motion pursuant to Section 5K1.1 authorized it to depart not only below the Guidelines sentencing range, but also below the statutory mandatory minimum sentence. The court then sentenced petitioner to 36 months' imprisonment. Pet. App. A5-A6.

2. The government appealed petitioner's sentence, and the court of appeals reversed. The court noted that the government had "expressly refused" to file a motion under 18 U.S.C. 3553(e) requesting that petitioner be sentenced below the statutory mandatory minimum. Pet. App. A11. Instead, the government's motion for departure based on petitioner's substantial assistance was filed pursuant only to Guidelines § 5K1.1, which "by its plain terms makes no mention of departure below mandatory minimums —only departure from the Guidelines range." Pet. App. A11-A12. The court concluded that only a government motion based on 18 U.S.C. 3553(e)—not a motion pursuant to Guidelines § 5K1.1—would authorize the sentencing court to depart below the statutory mandatory minimum sentence. Pet. App. A16.

Judge Heaney dissented. Pet. App. A25-A38. He concluded that "a district court may depart below the guidelines range and the mandatory minimum sentence once the prosecutor has filed a substantial assistance motion under section 5K1.1." Pet. App. A26. Judge Heaney relied on the commentary to Section 5K1.1, which states that "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence." Pet. App. A29-A30, quoting Guidelines § 5K1.1, Application Note 1. In addition, Judge Heaney noted that Application Note 7 to Guidelines § 2D1.1, which states that a mandatory minimum sentence for a drug offense may be "waived" on the basis of a defendant's substantial assistance, cites Guidelines § 5K1.1. Pet. App. A32-A34.

## ARGUMENT

Petitioner contends (Pet. 6-15) that the court of appeals erred in holding that the district court lacked authority to impose a sentence below the statutory minimum because the government filed a motion pursuant to Sentencing Guidelines § 5K1.1 requesting a downward departure from the applicable Guidelines range, but refused to file a motion under 18 U.S.C. 3553(e) requesting a sentence below the statutory mandatory minimum sentence. That contention does not warrant review by this Court.

1. Guidelines § 5K1.1 provides that, "[u]pon motion of the government * * * the court may depart *from the guidelines*" (emphasis added). Section 5K1.1 does not refer to departures from statutory mandatory minimum sentences. Instead, the commentary to Section 5K1.1 states that a departure below a mandatory minimum sentence may be justified "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." One of the circumstances set forth in 18 U.S.C. 3553(e) is that the government must move for a departure below the mandatory minimum sentence. Consequently, a motion under Section 5K1.1 to depart below the Sentencing Guidelines range does not authorize the sentencing court to depart below a mandatory minimum sentence established by Congress.

As the court of appeals recognized, 18 U.S.C. 3553(e) and Guidelines § 5K1.1 are distinct provisions that serve different purposes. The prosecutor may reasonably determine, based on his evaluation of the seriousness of the defendant's crime and the value of his cooperation, that the defendant's assistance warrants a motion pursuant to Guidelines § 5K1.1 recommending a departure below the Guidelines range,

but not a motion under 18 U.S.C. 3553(e) requesting a sentence below the statutory minimum. In this case, although petitioner assisted the government in its investigation of Michael Garrett, the value of petitioner's cooperation was substantially diminished by her lack of truthfulness during her pretrial deposition. Under these circumstances, it was reasonable for the prosecutor to conclude that petitioner's assistance justified a recommendation that the district court depart below the Guidelines range, but that petitioner's less-than-full cooperation did not merit a government motion seeking a sentence below the statutory minimum sentence. See generally *Wade* v. *United States*, 112 S. Ct. 1840, 1843-1844 (1992) (prosecutor has broad discretion to decide whether to file a substantial assistance motion, subject only to constitutional limitations).

2. As petitioner points out (Pet. 8-11), the court of appeals' decision conflicts with the decisions of the Second and Ninth Circuits in *United States* v. *Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991), and *United States* v. *Keene*, 933 F.2d 711 (9th Cir. 1991).[2] Each of those courts held that a motion by the government under Guidelines § 5K1.1 authorizes a sentencing court to depart below both the Guidelines sentencing range and the statutory minimum sentence. See *Cheng Ah-Kai*, 951 F.2d at 492; *Keene*, 933 F.2d at 715; see also *United States* v. *Wade*, 936 F.2d 169, 171 (4th Cir. 1991) ("Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory mini-

[2] The Court noted this disagreement in *Wade*, but concluded that it was not required to resolve it in that case. See 112 S. Ct. at 1843.

mum sentences permitted by 18 U.S.C. § 3553(e)."), aff'd on other grounds, 112 S. Ct. 1840 (1992).

Although there is thus a conflict in the circuits on the question presented in this case, that conflict does not merit immediate review by this Court because the Sentencing Commission has authority to resolve the question. The Court has made clear that the Sentencing Commission is responsible in the first instance for resolving conflicts among the courts of appeals concerning the proper application of the Guidelines. In *Braxton* v. *United States*, 111 S. Ct. 1854, 1858 (1991), the Court observed that "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Consequently, the Court indicated that it will "be more restrained and circumspect in using [its] certiorari power as the primary means of resolving such conflicts." *Ibid.*

There is no doubt that Congress granted the Sentencing Commission authority to resolve the issue presented in this case by amending Guidelines § 5K1.1 and the accompanying commentary to clarify whether a motion by the government pursuant to that provision permits the sentencing court to impose a sentence below the statutory minimum. See 18 U.S.C. 3553(e) (sentence below a mandatory minimum sentence "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission"). The conflict among the circuits on this issue has developed only recently and may be the subject of Commission action if the conflict persists. Because the Commission may address the issue presented in this case, and has the authority

to resolve it conclusively, there is no reason at this time for the Court to grant review and thereby short-circuit the process established by Congress for revising the Guidelines.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

NINA GOODMAN
*Attorney*

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